United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mailing

76-1426

To be argued by
LEE ALAN ADLERSTEIN

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1426

UNITED STATES OF AMERICA,
Appellee,

—against—

MICHAEL A. MEDICO,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
LEE ALAN ADLERSTEIN,
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Of Counsel.

UNITED STATES COURT OF APPEALS
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Preliminary Statement

Michael Medico appeals from a judgment of the United States District Court for the Eastern District of New York (Weinstein, *J.*) entered on September 17, 1976, convicting him of two counts of robbery in violation of 18 U.S.C. Section 2113(a) and (d) and one count charging a conspiracy to rob a bank in violation of 18 U.S.C. § 371. Appellant was sentenced to an eight year term of imprisonment on Count Two, the substantive count charging a violation of § 2113(d), and to a concurrent term of five years on the conspiracy count.[1] Appellant is presently in custody serving this sentence.

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[1] Because of merger "no sentence was imposed on Count One (1)" (App. Appendix, A-14).

On this appeal, appellant presses essentially two claims: (1) that it was improper for the trial court to permit the introduction of hearsay evidence concerning the getaway car; and (2) that the district court should have granted a motion to suppress physical evidence seized during a consent search of appellant's apartment. Related to this second claim is an argument that the evidence should not in any event have been admitted into evidence since it was highly prejudicial. In addition, appellant advances two miscellaneous claims concerning identification evidence and adequacy of counsel.

Statement of Facts

A. Pre-Trial Suppression Hearing

During the brief pre-trial suppression hearing, FBI Agent Mawn testified that on June 2, 1976, he was conducting a surveillance in the vicinity of appellant's residence. At that time, he observed appellant's wife exit her residence and he followed her for several blocks before speaking to her. Agent Mawn introduced himself to appellant's wife, advised her that he was an FBI agent conducting an investigation of her husband and Grillo and stated that he wanted to talk with her. Appellant's wife, who was with her small daughter, was advised that her husband was in custody and being transported to the FBI New York headquarters. She was advised that the agents would like to go with her to her apartment in order to see if Grillo was there. Upon her reply that Grillo was not there, she was asked if the agents could conduct a search of her house. She replied that they could and appellant's wife, her daughter, together with the agents went to the apartment where fellow FBI agents, who had been notified of her consent, were wait-

ing (T. 31-38). Inside the apartment, appellant's wife executed a Consent to Search Form (Government's Exhibit 5). At no time were any weapons displayed to appellant's wife (T-39).

Appellant's wife then testified that while making a telephone call in a public telephone booth located in a candy store, an FBI agent slammed down the receiver, identified himself, and stated that he wanted to talk with her. At the time, according to appellant's wife, her daughter became hysterical and started crying. The agents took them outside to a car and inquired as to the location of her husband. She was asked if they could take her to her apartment to conduct a search, to which she replied, "yes" (T. 42-46). On direct examination, appellant's wife when asked, "Did they say anything threatening or menacing at that time?" answered, "No." Together with the agents, she and her daughter returned to the apartment where they met additional agents. At this time, according to appellant's wife, she was told she could either sign the consent form or the agents would obtain a search warrant. She ultimately signed the form (T. 46-48). Mrs. Medico stated that on that particular day she had been using pot, cocaine, heroin and methadone and that she was also under psychological care receiving tranquilizers and sleeping medication.

Following this testimony, Judge Weinstein denied the motion to suppress on the ground that "[v]oluntary consent was obtained" (T. 52).[2]

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[2] In addition, the district court, on appellant's motion, conducted a "*Simmons*" hearing, *Simmons* v. *United States*, 390 U.S. 377 (1968), following which it was held that the pre-trial photographic identification was not impermissibly suggestive.

Page references to the record preceded by the letter "T." refer to the hearing of June 24, 1976. Other references to the record pertain to the trial which was held on June 28, 1976.

B. The Government's Case

On the morning of May 27, 1976, two masked men[3] committed an armed bank robbery of the Chemical Bank located at 23-98 Bell Boulevard, Queens, New York and carried away over twenty-two thousand dollars. The branch manager, Rosario Frisina, testified that he saw two armed men in the bank (13). One of the robbers held a shotgun to the assistant branch manager while the other came behind the teller's area where Mr. Frisina was working. This latter person, the robber who came into the teller's area, was identified by Mr. Frisina as the appellant. At the time, appellant was wearing a stocking mask which showed some of his facial features and according to Frisina, appellant came to within two feet of him (Frisina) and took cash from the well-lighted teller's area. Appellant stopped near Frisina and appellant's nose, part of his eyes, moustache and ear were visible. (29-32). After making an in-court identification of appellant, Frisina identified a face forward surveillance photograph of appellant which had been taken of him in the teller's area during the robbery. A photo spread identification of appellant by Frisina on June 2, 1976 was also admitted into evidence.[4]

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[3] John Sam Grillo, indicted with appellant in this case, was acquitted by a jury in a separate trial held immediately prior to appellant's trial. Since an issue seems to be made about this acquittal, we believe that it is appropriate to note that Grillo, at the time of his trial, had entered a plea of guilty to an unrelated bank robbery charge, 76 Cr. 390 E.D.N.Y. and was subsequently sentenced on July 9, 1976. (Dooling, J.). He is currently serving this sentence.

[4] Appellant, in his brief, seeks to impeach Frisina's identification of appellant through a reference to Frisina's testimony that he was not wearing his glasses at the time of the robbery and that the bank surveillance photograph of appellant was a better likeness than the photograph in the photo spread. (App. Br. p. 31). It should be pointed out that Mr. Frisina, during cross-examination identified appellant after descending from the witness stand, taking off *his glasses* and approaching appellant to

[Footnote continued on following page]

Barbara Balzarini, a teller, testified that she was in the teller's area when one of the robbers, who she identified as appellant, came into that area to take money. (43). Ms. Balzarini had seen appellant pulling a stocking mask over his face. Indeed, she stated that she had seen appellant's face, from the tip of the nose to the chin, unmasked. (42, 44, 50-51). Appellant had come within "one" or "two feet" of her while he was taking money in the teller's area and she was able to look "right at" his face.[5] Appellant's "whole face" could be seen by Ms. Balzarini through the stocking mask and the facial features of appellant were not distorted; his nose, eyes, eyebrows, moustache, and dark hair were all visible. The photo spread from which Ms. Balzarini had identified appellant for the F.B.I. was also admitted into evidence. (57-62).[6]

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within the same distance from appellant as at the bank (34, 35). Further, Frisina's initial in-court identification of appellant was made prior to the identification of the bank surveillance photograph (17-19). In any event, as noted above, the Court held that the pre-trial identification procedures were not impermissibly suggestive (31).

[5] The bank surveillance photograph identified during Mr. Frisina's testimony was also identified by Ms. Balzarini. The photograph strongly corroborates her testimony: she is seen facing appellant only a very short distance away, and it can be seen that his facial features are visible under the mask.

[6] Appellant seeks to undercut the evidence against him on the basis of the acquittal of his co-defendant, John Sam Grillo. However, it should be pointed out that although the Government used, in the Grillo trial, the same two identification witnesses, Grillo was simply much further from the witnesses during the robbery, and he was obstructed by the assistant bank manager whom he had used to shield himself. Moreover, Grillo used a much less revealing mask. On the other hand, the stocking mask worn by appellant was described by Mr. Frisina as "tight', and by Ms. Balzarini as "tannish color, very light . . . I could see through it." (37, 58).

Corroboration of the identification testimony was provided by FBI agents who arrested appellant on June 2, 1976 in his Bronx, New York neighborhood after he had attempted to avoid arrest. In appellant's possession at the time of his arrest was two hundred and forty six dollars in cash, including two fifty dollar and five twenty dollar bills. (68-70). A search of appellant's apartment conducted following his arrest and with the consent of his wife, revealed the following items: pants of appellant's wife which were full of shotgun pellet holes; two empty .22 calibre and one empty .32 calibre cartridges; and several lead .22 or .25 calibre slug fragments fired into a bedroom wall. (78-85).

Finally, with respect to the getaway car, assistant bank manager William Carmody testified that after the robbers left the bank he went to lock the front doors. While there, a bank customer, known to Carmody, relayed a message that the customer said had come from a young man whom Carmody could see sitting in a car parked in front of the bank. The message was that the getaway car was a tan Dodge Valiant with New York license number 700 CQA. Carmody immediately wrote this information in a checkbook that he had in his possession. This book was later admitted into evidence over defense objection: (90-95).[7] This vehicle was thereafter linked to appellant through the testimony of William

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[7] After Mr. Carmody's testimony and the introduction of the checkbook, Judge Weinstein cautioned the jury as follows:

> Now, you understand this is hearsay, and if this young man who—or this fifty-year old man were here, the opportunity would be afforded to the defense counsel to cross-examine, but they are not here. You understand that? So I am letting it in, but you will have to decided how much probative value it has. But bear in mind that the people who allegedly said this are not here to be cross-examined, and they are not under oath (95).

Cariola, a fellow employee with appellant at a taxicab company. According to Cariola, as late as May, 1976 he had seen appellant driving a tan Dodge with license number 700 CQA to and from their place of employment.

C. The Defense Case

Ina Castro, a friend of appellant's wife, testified that at about 8:45 A.M. on May 27, 1976 (the date of the bank robbery) she had telephoned the Medico residence on the Grand Concourse, Bronx, New York, and that appellant[8] answered the telephone. Appellant chose not to testify.

ARGUMENT

POINT I

It Was Not Error to Have Permitted the Hearsay Evidence Concerning the Getaway Vehicle.

Appellant contends that it was prejudicial error for the district court to have permitted the Government to introduce into evidence the tesimony of William Carmody concerning a statement made by an unknown young man that the getaway car was a tan Dodge Valiant with New York License number 700 CQA. He argues that the hearsay testimony admitted into evidence was insuffi-

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[8] Three defense stipulations were entered into: (1) that the cash found on appellant at the time of his arrest contained no "bait money" from the bank; (2) that no latent fingerprints of value of the appellant were found at the bank; and (3) that a bank employee if called would have testified, that the robber who went into the teller's area "closely resembled" the photograph of appellant that had been shown as part of the photo spread. (110-111).

ciently reliable and did not fall within any of the recognized exceptions to the hearsay rule.

The Government submits that the testimony was properly admitted by Judge Weinstein under Rule 804(b)(5) of the Federal Rules of Evidence. That Rule provides that a statement, possessing certain "circumstantial guarantees of trustworthiness", is not excluded by the hearsay rule if three conditions are met: a) "the statement is offered as evidence of a material fact;" b) "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;"[9] and c) "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." With respect to the testimony of Mr. Carmody, Judge Weinstein properly found that all of these criteria were met.

Rule 804(b)(5), along with its companion — Rule 803(24), is a new provision. Its purpose is to:

> [afford to] the trial judge discretion to admit or exclude on the basis of the peculiar strength or weakness of the particular evidence offered, a determination requiring an assessment of the evidence in the setting of the case since neither trustworthiness nor the dangers specified in Rule 403 can be evaluated independently of the circumstances presented. This approach is consistent with the suggestions of many of the leading writers in the field of evidence over the past century, and furthers the federal rules' paramount goal of making relevant evidence admissible.

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[9] Appellant does not contest the fact that the bank customer and young man at the curb were unavailable to the Government.

4 Weinstein's Evidence, pp. 803-244 and 804-102. Thus, in a situation such as that presented by the testimony of Mr. Carmody, a balancing is required between the policy of flexibility that lies behind the new rule, and the danger of undue prejudice. See Rule 403.

The circumstances guaranteeing the trustworthiness of Mr. Carmody's testimony were compelling. The description of the getaway car was obtained within minutes of the robbers leaving the bank and immediately written down by Mr. Carmody onto a piece of paper. Mr. Carmody knew the customer who relayed the information to him and saw the man approximately once a month at the bank. Further, the testimony of Mr. Cariola, which linked the car to appellant, was not hearsay and substantially buttressed the reliability of the Carmody testimony.[10] Appellant attempts to attack the evidence by speculating on possible sinister motives on the part of the "young man" who actually saw the car. The Government submits, this is mere speculation and unwarranted conjecture under these circumstances.

In view of the fact that Rule 804(b)(5) is of recent vintage, neither this Court nor the Supreme Court have as yet had occasion to interpret its provisions. The Supreme Court has, however, in two recent cases, had the opportunity to comment on the kind of circumstances that enhance the reliability of hearsay statements for evi-

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[10] Appellant questions the reliability of William Cariola's testimony on the basis of an assertion, made at a sidebar conference during the Government's case. At that time, the prosecutor sought to offer evidence that Cariola had never owned the tan Dodge but that he had lost his wallet and subsequently found that the car had been registered to him by an unknown person. This testimony, on defense objection, was excluded. However, we submit that if the jury had been aware of these facts, appellant's argument that he had no relation to the bank robbery would have been further weakened.

dentiary purposes. In *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), the Court found error in the refusal of the trial judge to admit into evidence a hearsay confession by a non-defendant which impliedly exonerated the defendant. The Court, in treating this declaration as against penal interest stated: "A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and the opportunity for cross-examination." The *Chambers* case then held that a "spontaneously" made hearsay statement, uttered "shortly after [the crime] had occurred," and "corroborated by some other evidence in the case" was admissible into evidence. 400 U.S. at 298-99, 300. We believe that this reasoning is applicable. See 4 Weinstein, *supra* at p. 804-102.

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), the Court declared as admissible into evidence a post-arrest statement by a confederate of Dutton implicating him. The Court stated that the reliability of the challenged statement was buttressed through the fact that the possibiliy of faulty recollection was "remote" and that the statement was "spontaneous." 400 U.S. at 89. The Government submits that the reasoning of *Chambers* and *Dutton* is, by analogy, applicable here. Also see the opinion of Judge Moore writing for the Ninth Circuit in *United States* v. *Brandenfels*, 522 F.2d 1259, 1264 (9th Cir. 1975).

United States v. *Yates*, 524 F.2d 1282 (D.C. Cir. 1975), cited by appellant, does not support appellant's argument. *Yates* involved a statement by a co-defendant directly contrary to the assertions of Yates. The *Yates* Court found such hearsay to be inadmissible inasmuch as it went to the heart of the defense. The Court, however, reaffirmed the principle of *Dutton* v. *Evans*, *supra*, that hearsay testimony is admissible where there are "indicia of reliability surrounding the evidence," the evidence

is "peripheral", rather than "crucial" or "devastating", and the witness is equally available to the prosecution and the defense. 524 F.2d at 1286.[11]

The Government submits that under Rule 804(b)(5), as applied to the facts of this case, Judge Weinstein properly exercised his discretion to admit the challenged evidence. The prejudice to the defendant through admission of the description of the getaway vehicle did not outweigh the enhancement of truth finding which resulted from the evidence. It should be emphasized also that Judge Weinstein carefully cautioned the jury on the hearsay nature of the evidence and the jury's right to disregard it entirely. See n. 7 *supra; Frazier* v. *Cupp*, 394 U.S. 731 (1969); *United States* v. *Cotroni*, 527 F.2d 708 (2d Cir. 1975). Accordingly, we contend that the admission of this evidence was not error.

POINT II

The Consent to Search of Appellant's Apartment was Voluntarily Given.

Appellant contends that the consent of his wife to search their apartment was not freely and voluntarily given. It appears to be his position that, crediting the wife's testimony, the district court's finding was erroneous.

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[11] In *Jackson* v. *United States*, 359 F.2d 260, *cert. denied*, 385 U.S. 877 (1966), the United States Court of Appeals for the District of Columbia Circuit held as properly received into evidence testimony of a robbery victim that she had heard a bystander call out that the defendant had stolen the victim's wallet. The Court found that such hearsay testimony constituted an admissible "spontaneous exclamation." 359 F.2d at 262. The Government submits that the facts in Jackson were less compelling for admission of the hearsay than the facts in the instant case, where the hearsay only indirectly implicated appellant.

We submit that the court's conclusion that a "voluntary consent was obtained" (T. 52) is amply supported by the record.

We note that the wife testified that when she first orally consented to the search of the apartment, there had been no threats or menacing by the agents. Moreover, she testified that at the apartment she had read the consent form and that there had been no threats or guns drawn when she consented. On this evidence alone, the finding of the district court was certainly correct. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). In addition, even if the agents had told her that if she failed to consent they would obtain a search warrant, a statement that the agent was not cross-examined about and which he did not mention on direct, there would be still no error in the district court's finding that consent was freely and voluntarily given. See *United States* v. *Miley*, 513 F.2d 1191, 1204-05 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1975); *United States* v. *Faruolo*, 506 F.2d 490 (2d Cir. 1974).

But, appellant seeks to avoid the objective facts which compel a finding that the consent was freely and voluntarily given by arguing that the surrounding circumstances were such that the alleged voluntary consent could not have been freely given. This is simply belied by the record: the admission by appellant's wife that there were no threats or menacing remarks which coerced her consent. Further, the fact that appellant was already in custody, was not a coercive circumstance. Indeed, even a defendant in custody may give consent, e.g., *United States* v. *Wiener*, 534 F.2d 15 (2d Cir. 1976). Thus, it was not improper for the agents to have, at such time, sought to obtain consent from the defendant's wife.

Finally, the testimony of Mrs. Medico, we submit, is simply incredible. For example, she testified that on the

day in question she had used "pot, cocaine, heroin and methadone," and in addition, "tranquilizers and sleeping medication." Thus, in the context of the overall hearing, the court, in finding the consent to be voluntary, impliedly rejected the testimony of Mrs. Medico that she had been threatened with being taken from her child. Indeed, Mrs. Medico had earlier testified that no threats were made. Thus, the court was entitled to reject her testimony on this point and find that her consent was voluntary and unequivocal. *United States* v. *Wiener*, *supra*. The case cited by appellant, *United States* v. *Bolin*, 514 F.2d 554 (7th Cir. 1975), is inapposite. In *Bolin*, the defendant understood the statement as a threat that if he did not give consent his girlfriend would be arrested; here, Mrs. Medico expressly said that there were no threats made to her. Indeed, at no time did she state that she understood the agents remarks to be threatening; to the contrary, she testified that "I don't think they threatened me" (T. 51). Obviously, the situation was simply that involving a very scared woman—understandably so, for her husband had just been arrested for a bank robbery. But, this circumstance does not preclude a finding that the consent was freely and voluntarily given.

In connection with the items found in the apartment and introduced into evidence, appellant now contends, for the first time, that it was error to have allowed their admission into evidence. He argues that these items were not sufficiently probative of guilt to overcome the prejudicial effect of their admission.

It must be noted initially, that there was no objection to this evidence below on this ground. The only objection raised concerned the legality of the seizure of these items and not their relevance to the issue in the case. Therefore, absent plain error, this issue, we submit, is not available for review by this Court. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

But turning to the merits, these shells, shot-through pants and slugs were properly admitted into evidence. See Rules 401 and 402, Federal Rules of Evidence.[12] There was testimony from both of the witnesses to the robbery that long guns or a shot gun had been used. Mr. Frisina testified that both robbers held long guns; however, Ms. Bazarini only recalled one gun in Grillo's possession. The items later found in appellant's apartment were certainly related to long guns, shot guns, and hand guns. Such evidence is, we submit, probative of appellant's guilt. As in *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970), from this evidence the jury could have inferred that appellant had recently been in possession of guns, and therefore had been in such possession at the time of the robbery six days earlier. From these inferences it was proper for the jury to conclude that this evidence was corroborative of appellant's identification as one of the

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[12] Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

bank robbers. See also, *United States* v. *Campanile*, 516 F.2d 288 (2d Cir. 1975); *United States* v. *Wiener*, *supra*.[13] Appellant's claim, therefore, should be rejected.

POINT III

The Miscellaneous Claims of Errors Are Without Merit.

First, appellant claims that somehow the in-court identification testimony was impermissibly tainted by the pre-trial identification procedures. However, appellant fails to do more than simply characterize the identification procedures as suggestive. We believe that this contention is frivolous. As set forth in fotnote 2, *supra*, the district court conducted a full *Simmons* hearing, following which it determined that the pre-trial identification procedures were not suggestive. Inasmuch as this finding was amply supported by the record, the district court's holding was not error.

Next, appellant's counsel states that appellant "had specifically requested that [the issue of adequate representation by trial counsel] be raised for him on appeal".

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[13] This Court's recent decision in *United States* v. *Robinson*, Docket No. 76-1153 (2d Cir. Slip. 5912, decided November 1, 1976), while reversing a bank robbery conviction because of admission into evidence of a pistol seized from the defendant seven weeks after the robbery, further supports our position. *Robinson* placed emphasis on the defense attorney's strong objections to the evidence, failure by the Government to prove that the defendant had a gun at the time of the robbery, and the lack of other identification evidence beyond that of an accomplice to prove that the defendant had robbed the bank. The *Robinson* case reaffirmed the *Ravich* Rule that admission into evidence of a weapon is permissible where, as in the instant case, there is no objection, there is strong identification and other evidence linking defendant to the crime, and there was testimony that defendant had a gun at the time of the robbery.

(Appellant's Brief p. 32). Appellant's counsel disagrees with this contention and states that his review of the proceedings in the district court "fails to reveal to appellate counsel tangible indication of inadequate representation by his trial counsel" (Ibid.). We agree. It is our contention that a review of the entire record confirms the opinion of appellate counsel that the representation in the district court was clearly adequate. Indeed, there has been no showing, nor can there be a showing on this record, of representation which should shock the conscience of this Court. See, e.g., *Rickenbacker* v. *Warden*, Docket No. 76-2036 (2d Cir. Slip Op. 1063, decided December 22, 1976).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
February 9, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
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Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 14th day of February 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Paul Windels, Jr., Esq.
51 West 51st Street
New York, N.Y. 10019

Evelyn Valenti

Sworn to before me this
14th day of Feb. 1977

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission [illegible]

KE NOTICE that the within
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e office at the U. S Court-
ban Plaza East, Brooklyn,
e ____ day of _____,
o'clock in the forenoon.

n, New York,
_____, 19____

_____
States Attorney,
for _____

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—Against—

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United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

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_____ is hereby admitted.
Dated: _____, 19____

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Attorney for _____

FPI-LC-5M-8-73-7355